No. 196. 27.

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Filed April 18, 1900.

In the Supreme Court of the United States.

October Term, 1899.

LI SING, PETITIONER,
v.
THE UNITED STATES.

No. 196.

MOTION TO DISMISS, OR AFFIRM, OR DISMISS OR AFFIRM,
FOR THE DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

LI SING, PETITIONER,
v.
THE UNITED STATES. } No. 195.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The petitioner was arrested on or about January 6, 1897, and, after a hearing before a United States commissioner, was ordered on June 24, 1897, to be deported as a Chinese laborer. (Record, pp. 5, 6, *et. seq.*, 38.) The Government had objected to the admission of the evidence of the petitioner and certain other Chinamen *viva voce* and by affidavit on the ground that under section 2 of the act of 1893 the facts offered must be established by the testimony of two credible witnesses other than

Chinese (pp. 8, 11, 38–42). The commissioner treated this evidence as in (p. 37), but held that under all the evidence the defendant is a Chinese laborer, and that if it were necessary to decide the Government's motion to strike out the testimony objected to, he should sustain the objection, and hold that the provisions of section 2 of the act of November 3, 1893 (28 Stat., 7), applied.

Thereupon petitioner filed his application for a writ of habeas corpus and a writ of certiorari for the purpose of reviewing the proceedings (pp. 1, 2). In this application petitioner set up the facts that he had been domiciled for many years as a resident Chinese merchant in Newark, N. J., that on or about June 22, 1893, he left this country for the purpose of temporarily revisiting China and bringing back with him his son, and with the intention of returning to this country; that before departing from this country he procured the certificate of identification prescribed by the regulations of the Treasury Department, and upon leaving China on his return had the said certificate duly countersigned by the representative of the United States at Hongkong; that upon his application for admission into this country to the United States collector, at Malone, N. Y., the latter decided that the petitioner and his son were entitled to enter and remain within the United States; and that thereupon they proceeded to Newark, the domicile and place of business of the petitioner, as aforesaid.

These writs being allowed, and returns thereto duly filed, and the cause coming before the court, after hearing it was ordered by the court that the writ of habeas corpus be dismissed, and that the petitioner be remanded

to the custody of the United States marshal for deportation under the order signed by the United States commissioner (pp. 2–6).

An appeal was taken by the petitioner to the United States circuit court of appeals (p. 46), assigning for error the holding of the court—

First. That the action of the collector in permitting petitioner to enter the United States did not bar subsequent proceedings for his deportation.

Second. That the burden of proof was thrown upon petitioner to show his right to remain.

Third. That petitioner should be deported.

The case was argued before the circuit court of appeals, and the order of the circuit court was affirmed on April 7, 1898, the decision (p. 50) holding that under the act of August 18, 1894 (28 Stat., 390), the decision of the collector of customs is a final and controlling adjudication only when adverse to the admission of an alien, citing *United States* v. *Jung Ah Lung* (124 U. S., 621), *Lem Moon Sing* v. *United States* (158 U. S., 538), and *In re Li Foon* (80 F. R., 881). Upon the question of the admissibility of the evidence of Chinese persons, the court held that, as the Commissioner excluded no evidence and decided upon the entire conflicting testimony that the defendant was a Chinese laborer, the question of the constitutionality of section 2 of the act of 1893 does not arise upon this record, and sustained the constitutionality of section 3 of the act of May 5, 1892 (27 Stat., 25), upon the authority of *Fong Yue Ting* v. *United States* (149 U. S., 698, 729), *Wan Shing* v. *United States* (140 U. S., 424), and *Wong Wing* v.

United States (163 U. S., 228), as showing that similar provisions are within the scope of the power of Congress to provide for the deportation of aliens who are deemed to be unlawfully within this country.

ABSTRACT OF RECORD EVIDENCE.

The defendant offered the certificate on which he was admitted at Malone (Exhibit A in original exhibits), to which the United States objected on the ground that the Supreme Court has held [*Lau Ow Bew* v. *United States*, 144 U. S., 47] that the certificate prescribed by section 6 of the act of 1884 (23 Stat., 105) is not applicable to a returning Chinese merchant, whose admission, it was claimed, is now governed by section 2 of the act of 1893 (28 Stat., 7; Record, pp. 6, 7). (See *Lem Moon Sing* v. *United States*, 158 U. S., 538, 540.) The defendant objected to the jurisdiction of the commissioner and the court on the ground that under the act of August 18, 1894 (28 Stat., 390), it rests with the collector finally to determine the legality of the entrance of a Chinaman; and claimed that where thus determined, the burden of proof rests upon the Government to show that the applicant was improperly admitted (pp. 6–7). His objections being overruled and motions based thereon denied, and the certificate being admitted (p. 18) only for the purpose of showing what papers were before the collector, to all of which rulings exceptions were taken, the defendant was then examined (pp. 8–10) under objection by the United States, based on section 2 of the act of 1893 aforesaid, and testified that being a resident of Newark, N. J., and

for six years a member of the firm of Sam Palmer & Co., engaged in business there and dealing in Chinese merchandise, and for a year and a half an active partner in that business, he left the United States in the summer of 1893 to go to China, procuring a week or two beforehand the certificate in evidence. A motion by the United States to strike out these statements and to exclude the testimony of the alleged senior partner of the firm (pp. 9, 11), on the ground that the act of 1893 also requires the fact to be proved by the firm's books, was granted and exception taken. On cross-examination the defendant stated that when he sold his laundry, about 1891, he took an active part in the firm's business and had never worked in a laundry since.

A witness (presumably white) testified (p. 25) that he had known the defendant between 1891 and 1893, had frequently been at the firm's shop and seen the defendant engaged there selling goods over the counter, and had himself made trifling purchases of the defendant. Another witness, apparently white (p. 27), testified that in 1889 and 1890 he had taken his washing to the defendant at his laundry in Broad street, Newark, and that afterwards, in 1892 and 1893, he had seen the defendant at the address of the firm of merchants on South Orange avenue behind the counter waiting on customers.

The defendant, recalled (p. 33), denied that he had offered money to a Government witness or to anyone else to testify that he was a merchant; stated that the name of his laundry was "John Sing," and the name was retained by the purchaser, and, being questioned to show that John Sing was not his name, but was the name of

the laundry, and was applied indifferently to all of the occupants by customers (in which line of testimony the Government did not acquiesce), he stated that among other Chinamen in the laundry called by the name of John Sing was his brother, *Li Sing;* and through the interpreter it was explained that the brother (who was then absent in China) had the same name as written in English, and as pronounced both in English and Chinese, but that the names differed as written in Chinese, had a different significance, and were further distinguished by slightly different shades of inflection in pronunciation. The defendant admitted that he knew the Government witnesses Gifford and Schenck, but denied that he knew Crowley and Wood (see *infra*), and stated in reference to Schenck's testimony that he had met him once in his (Li Sing's) brother's place (the other Li Sing, to whom it was claimed the laundry was sold in 1891), but he had not worked there; he had only visited his brother, who went to China in November, 1896 [the applicant having returned from China in August, 1896]. The affidavits of various Chinamen, including the defendant himself, of the senior partner in the firm of Sam Palmer & Co., and of a former partner of the defendant in the laundry business (p. 38 *et seq.*), are, with some variations, to the effect that the defendant had been in this country and at Newark for a number of years; had first been in partnership with his brother (who is distinguished in these affidavits as Li *Zing*), and, after an intermediate visit to China, had gone into partnership in a laundry with another Chinaman, Lee Ging, or Gang, or Gong; that in 1891 he had

sold the laundry to his brother and had never since been interested in it or been connected with it in any manner; that he had a substantial interest in the grocery business of Sam Palmer & Co. for several years, and in 1891, after selling out his interest in the laundry, had devoted all his time to the business of that firm.

The Government testimony was offered without prejudice to the objection that the defendant had failed to establish his right to be and remain in this country as a part of his own case, and it was stipulated that the defendant's testimony should be admitted subject to the Government's objections, which were to be passed upon at the end of the proceedings.

The Government witness Gifford (p. 12) identified Li Sing as the Chinaman whose picture was attached to an affidavit (Exhibit 1) taken before the witness as a State official; he knew him as John Sing; he had seen him on a great many occasions at the laundry in question, where the witness' own laundry work had been done prior to Li Sing's last departure for China (the latter several times receiving the wash himself), and on one occasion since. But the witness was not clear whether he had seen Li Sing there since his return from China. He also testified that Li Sing called on him twice and put questions to him, the import of which was whether the witness did not know that Li Sing was a member of the firm of Sam Palmer & Co. (pp. 13, 15).

The witness Crowley (pp. 15–17), a plumber, also identified Li Sing as the man whose photograph was attached to Exhibit 1. He had known him as John Sing; had seen him constantly in the laundry for six or seven years

before he went to China and at least a dozen times since; had seen washing brought there since Li Sing's return from China, and had seen him washing and ironing; had taken a plumbing bill to the laundry since Li Sing's return, made out to John Sing, and Li Sing had paid it himself. Witness also testified that Li Sing or John Sing had seen him since returning from China, and wanted the witness to swear that he knew him to be a merchant in Newark, and said, either himself or through an interpreter accompanying him, that the witness would be well paid for his services.

The policeman, Wood, testified positively (p. 20) that he had known Li Sing as John Sing for sixteen or seventeen years, and had seen him more than a dozen times ironing in the laundry since his return from China.

Chinese inspector Scharf identified Li Sing by Exhibit 1 as being present in the case therein referred to, and testified that on the 15th day of January, 1897, he went to Li Sing's laundry and saw two Chinamen at work there washing and ironing clothes, and obtained from them a list of prices which was offered in evidence and marked "Government Exhibit 2."

The witness Spaeth (pp. 28–9) knew the defendant John Sing, and had seen him washing and ironing and taking in laundry work at the laundry on Broad street. He or his sister customarily took his laundry work there, but he had only seen the defendant once in the laundry since September, 1896.

The witness Schenck, a colored man, identified the defendant positively as John Sing, and had seen him in the laundry since he came back in August, 1896, and

since or during January, 1897, and he was ironing the last time the witness saw him, though he does not remember seeing him more than once or twice since he came back.

A SUGGESTION AS TO JURISDICTION.

A point of jurisdiction is suggested at the outset which it is understood the court will consider, either in respect to its own jurisdiction or the jurisdiction below, although the point may not be made in the record nor argued by counsel. (*Lau Ow Bew Case*, 144 U. S., 47, 55; *Great Southern Hotel Company* v. *Jones et al.*, opinion delivered April 9, 1900.)

This court undoubtedly has appellate jurisdiction to determine whether a lower court had original jurisdiction (*Whittemore* v. *Amoskeag Bank*, 134 U. S., 527, 529), and, it would necessarily seem, also has appellate jurisdiction to determine whether a lower court had appellate jurisdiction, or to determine what court properly had appellate jurisdiction. The present case is one of habeas corpus, and appears to be here properly under the Lau Ow Bew ruling (ib., p. 58) by which the writ of certiorari in that case was held to have been providently issued. The question of propriety of the issue of the writ is foreclosed by the action of the court in awarding it, but the question of power to issue it is always open (*Forsyth* v. *Hammond*, 166 U. S., 506, 511).

Since by section 6 of the circuit court of appeals act that court was given appellate jurisdiction to review final decisions of the circuit courts "in *all cases* other than those provided for in the preceding section of this

act, unless otherwise provided by law," the appellate jurisdiction not vested in the Supreme Court was vested in the circuit court of appeals and the entire jurisdiction distributed. (*McLish* v. *Roff*, 141 U. S., 661, 666; *Lau Ow Bew's* case, 141 U. S., 583, and 144 U. S., 47, 56; *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S., 372, 383; *Carey* v. *Houston and Texas Central Railway*, 150 U. S., 170, 179; *The Paquete Habana*, 175 U. S., 677, 681, 683.) And since a habeas corpus case may go properly to the circuit court of appeals, and since it is not a case in which an appeal lies from that court under the last paragraph of section 6 of the act, and since the decree of that court is made final "by the effect of the section" (*vide* Lau Ow Bew's case, p. 58), although not expressly made so, therefore this case is clearly reviewable here upon certiorari, *unless* (it is respectfully suggested) the indication of the Lau Ow Bew decision (ib.), that habeas corpus cases which involve the constitutionality of a law of the United States or the construction of a treaty made under its authority should be taken direct to the Supreme Court from a district or circuit court under section 5 of the act, covers the present case.

The case does involve both these questions. Now, in proceedings upon habeas corpus the method of review is by appeal (sections 763, 764, Rev. Stat.; act of March 3, 1885, 23 Stat., 437; *In re Neagle*, 135 U. S., 1, 41, 42); and where there is a plain and adequate remedy by appeal or otherwise the court will not grant certiorari. (*In re Tampa Suburban R. R. Co.*, 168 U. S., 583.)

In view of the foregoing, it is pertinent to suggest that

the petitioner's proper course for review would have been by direct appeal to this court from the order of the circuit court affirming the Commissioner's judgment of deportation. "In *Nishimura Ekiu* v. *United States* (142 U. S., 651), jurisdiction of an appeal on *habeas corpus* directly from the circuit court was taken, as it was in *Horner* v. *United States* (No. 2), 143 U. S., 570" (*In re Lennon*, 150 U. S., 393, 399), on the ground that the constitutionality of a law of the United States was involved, and that the cases therefore fell within the classes enumerated in section 5 of the act. Hence the right of appeal from judgments on *habeas corpus* of circuit courts or district courts directly to this court still exists in all cases designated in section 5. (*In re Lennon, supra; Boske* v. *Comingore*, decision rendered April 9, 1900.)

ARGUMENT.

I.

Petitioner not entitled to return as laborer.

When this man, being a laborer, went to China in 1893, he could not obtain a laborer's certificate of identity provided for by section 4 (as amended) and section 5 of the act of 1882, and could not return to the United States as a laborer, because of the prohibition in the act of October 1, 1888 (25 Stat., 504), the constitutionality of which was sustained in the *Chinese Exclusion Case* (130 U. S., 581), even as to a Chinese laborer who had left this country before October 1, 1888, and held a return certificate under the act of 1884. After December 8, 1894, the applicant, if a registered laborer under section

6 of the act of 1892, or the amendment thereto of the act of 1893, and, if otherwise qualified under Article II of the treaty of 1894 (28 Stat., 1210), might have obtained a certificate of identity and returned to the United States. The treaty so far modifies the act of October 1, 1888 (21 Op. A. G., 68). His inability to return legally as a laborer perhaps explains the reason why he took out with him the irregular certificate (21 Op. A. G., 481; referring, however, to Chinese persons presumably not laborers entering this country for the first time) issued at the Chinese consulate at New York, and styling Li Sing a "wholesale grocer."

II.

Even assuming merchant status, his irregular certificate was wholly insufficient.

This certificate was thus irregular in form, although under the Lau Ow Bew decision the certificate of section 6 of the act of 1884 is not required of returning Chinese merchants already domiciled in the United States, and although the document might have been taken by the collector (as it doubtless was) for what it was worth as evidence; and the certificate was insufficient in substance even if Li Sing was a merchant, because his case should have been governed at the frontier by the requirement of section 2 of the act of 1893, that a merchant applicant for entrance shall establish his former status here as a merchant, "as hereinbefore defined," by the testimony of two credible witnesses other than Chinese. The fact that this requirement was imposed

after Li Sing left this country can not withdraw his case from compliance in view of the decision in the *Chinese Exclusion Case*, which invalidated laborers' return certificates previously valid; nor was the new requirement an unreasonable or an absurd exaction from a returning merchant within the Lau Ow Bew ruling, because, the law plainly demanding that such an applicant shall present the required testimony on his entrance, it is not impracticable to do so if it is possible or the evidence exists. And if it is not possible or the evidence does not exist, then the applicant has no right to enter.

III.

Collector's decision final only if adverse to admission.

The plain terms of the act of August 18, 1894 (28 Stat., 390) makes the decision of the collector final, unless reversed on appeal to the Secretary of the Treasury, only "*if adverse to the admission of such alien.*" The decision of the collector to admit is not a controlling adjudication, and judicial cognizance is no more excluded than it was in the *Jung Ah Lung* case (124 U. S., 621), under section 9 of the act of 1884. It is only the decision of the appropriate immigration or customs officers *excluding an alien* which is made final in every case unless on appeal to the Secretary of the Treasury it be reversed. (*Lem Moon Sing* v. *United States*, 158 U. S., 538, 548–9.) It is not necessary to extend the argument on this point; the language of the act and of the decisions permits no other view. (See opinion of the circuit court of appeals herein; *In re Li Foon*, 80 Fed. Rep., 881.)

The ineffective act of September 13, 1888.

The act of September 13, 1888 (25 Stat., p. 476), enacted that from and after the date of the exchange of ratifications of the pending treaty between the United States and the Emperor of China (which was signed on March 12, 1888), it shall be unlawful for any Chinese person, whether a subject of China or any other power, to enter the United States except as therein provided. Section 15 of that act repealed the acts of 1882 and 1884, "to take effect upon the ratification of the pending treaty, as provided in section 1 of this act." The treaty failed of ratification, and it has been supposed by the Executive that the act as a whole failed to take effect because the treaty was not ratified. (2 Supp. Rev. Stat., pp. 15, 141.) Some of the provisions of the act have been incorporated in later laws and some amend earlier laws; for instance, a portion of section 2 is in effect reproduced in Article III of the treaty of 1894; section 3 finds a corresponding provision in section 2 of the act of 1893; sections 2 and 4 modify and enlarge the provisions of section 8 of the act of 1882 as amended; sections 5, 6, and 7 correspond to Article II of the treaty of 1894, in connection with the Treasury regulations as to ports of reentry for laborers. (21 Op. A. G., 68; Treasury Chinese Regulations, 1899, p. 39, par. 42.)

Section 12 provides for an examination of Chinese passengers arriving on vessels and for a comparison of their certificates with the list of passengers provided for by section 4. No passengers shall be allowed to land in violation of law, "and the collector shall in person

decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury and not otherwise." Section 13 provides for the arrest of Chinese found unlawfully in the United States, and for hearing before a justice, judge, or commissioner, and for deportation when the defendant is adjudged to be not lawfully entitled to be or remain in the United States, "but any such Chinese person convicted before a commissioner of a United States court may within ten days from such conviction appeal to the judge of the district court for the district * * * "

In *United States* v. *Jim* (47 Fed. Rep., 431) the district court for the State of Washington took cognizance of an appeal by virtue of this act, and held that "every part of the act became effective from the date of its approval except the particular provisions of the first and fifteenth sections, which are specially, by the provisions contained therein, made to depend for vitality upon the contingency of the ratification, at a future time, of the pending treaty."

In the case of *Mah Wong Gee* (id., 433) it was held that "parts of the act were made to take effect on the ratification of the treaty, and the rest, including section 13, providing for an appeal, were made to take effect presently, and became at once and are now a part of the law of the subject." In *United States* v. *Chong Sam* (id., 878) it was held that section 13 and all other sections, except sections 1, 2, 4, and 15, are in force. In *United States* v. *Lee Hoy* (48 Fed. Rep., 825) it was held that sections 12 and 13 are in force. In *United States* v.

Gee Lee alias Lee Hoy (50 Fed. Rep., 271) the circuit court of appeals of the ninth circuit held that section 13 of the act is in force, but that section 12 is not in force. "Particular provisions of the act may be in force as not being within the purview thereof as declared in section 1 as follows: 'It shall be unlawful for any Chinese person, whether a subject of China or any other power, to enter the United States except as hereinafter provided.' Such is section 13 of the act * * *" In *United States* v. *Long Hop* (55 Fed. Rep., 58) it was held that section 13 of the act is in force, and also that all of the act is in force except sections 2–4 and 15. "Parts of the act were made to depend upon the ratification of the pending treaty relating to Chinese, and as that ratification has not taken place there is no field of operation for them. They are sections 2 to 4 and section 15. The law exists, but there is nothing for it to operate on. But the rest of the act, including section 13, has a field of operation."

(See also *United States* v. *Wong Dep Ken*, 57 Fed. Rep., 203, and *United States* v. *Loo Way*, 68 Fed. Rep., 475.)

It will thus be observed that section 13 has generally been held by the Federal courts which have directly passed upon it to be in force, although there is a divergence of opinion as to other sections. It seems that the Supreme Court has never passed on this question, and has never in any of the decisions relating to Chinese immigration referred to any part of the act of September 13, 1888, as in force.

The intimation of the opinion of the circuit court of

appeals in this case is that section 12 of the act which provides that the decision of the collector "shall be subject to review by the Secretary of the Treasury and not otherwise" did not take effect, because the court says: "*If this section had gone into effect* and had continued to be in effect until August 27, 1896, when the collector at Malone acted in the matter, his decision would have been final." The court then passes on to the act of October 1, 1888, absolutely prohibiting the admission of Chinese laborers, and infers from the contrariety between the acts of September and October, 1888, that section 12 of the act of September 13, 1888, was not regarded as ever having gone into effect, citing *United States* v. *Gee Lee*, *supra*. After declining to express an opinion regarding section 13, the question generally is held not to be a living one because of the provisions of the act of August 18, 1894, *supra*, which makes final the decision of the immigration or customs officer if adverse to the admission of the alien, unless reversed on appeal to the Secretary of the Treasury.

So that the foregoing review of the act of September 13, 1888, appears to bring us to the necessary conclusion that that act is not involved in this case, because the defendant did not undertake to proceed by means of the appeal from the judgment of the commissioner provided for by section 13, but elected the remedy upon writs of habeas corpus and certiorari; and because, if section 12 of the act making, apparently, the decision of the collector in person a final determination, whether in favor of or adverse to the alien, subject only to review by the

Secretary of the Treasury, was ever in force, it has certainly been repealed and supplied by the act of August 18, 1894.

V.

Section 3 of the act of 1892; the Commissioner's finding of fact final.

Coming, then, to the actual issues, the proceedings for Li Sing's deportation were instituted under section 12 of the act of 1882 as amended by the act of 1884 (see opinion of circuit court of appeals), which provides "that no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came and at the cost of the United States after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States." * * *

It is to be noticed that where the certificate of section 6 of the act of 1884 is required as the sole evidence permissible to establish a right of entry into the United States (as, for instance, in the case of a merchant entering for the first time), and is produced, it may nevertheless be controverted, so that the law has thus, as well as by the act of August 28, 1894, reserved the right of the United States to disprove facts stated in the certificate.

The jurisdiction of the commissioner having thus attached, the case proceeded under section 3 of the act of 1892, which provides—

> That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, *unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner,* his lawful right to remain in the United States.

This section specifically applies to arrests under the act of 1892 or under the previous acts.

The relative law under section 12 of the act of 1882 as amended required deportation after the Chinese person was brought before a commissioner "and found to be one not lawfully entitled to be or remain in the United States," while the law formulated under the ineffective act of September 13, 1888, required deportation when the defendant was convicted upon hearing before a commissioner, "and found and adjudged to be one not lawfully entitled to be or to remain in the United States." And it may be pointed out here, as additional support of the contention that the decision of the collector was not final in this case, so as to make the question of the applicant's right *res adjudicata*, that in the Jung Ah Lung case the court said (124 U. S., 621): "On the contrary, the implication of section 12 [of the act of 1882] is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with."

By the act of 1892, therefore, the burden of proof has

been cast upon the Chinese person, who must establish his right to remain by affirmative proof to the satisfaction of the commissioner; and section 3 of that act applies to arrest, not only under that act, but under the previous acts.

The second objection of the defendant (under the assignments of error in the circuit court of appeals, rec. p. 46) is addressed to the constitutionality of this section of the act of 1892, his first objection being based upon the finality which he claims for the collector's decision. The latter point has been heretofore discussed, and the constitutionality of section 2 of the act of 1893 will be considered *infra*.

It is very manifest that the justice, judge, or commissioner is now made the final and conclusive authority upon the facts. The character and degree of affirmative proof must be such as to satisfy him, and his finding of the facts can not be reviewed by any other tribunal. It can not be doubted that these propositions are true in view of the language used in section 3, and equally it can not be doubted that the final determination of facts regarding the right of an alien to remain, like the right to land, may be intrusted by Congress to the courts, to judicial officers, or to executive officers; and "when the statute gives discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of these facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence upon which he acted." (*Jung Ah Lung*, 124 U.S., 621; *Nishimura Ekiu*

v. *United States*, 142 U. S., 651, 660; *Lem Moon Sing* v. *United States*, 158 U. S., 538, 544.) Surely it is as much within the acknowledged power of the legislature to prescribe the evidence which shall be received before judicial officers whom it clothes with certain authority as before executive officers.

Apart from the positive provision of the statute and its broad force, the constitutionality of which is sustained by these decisions, the general rule is that where an officer or tribunal has jurisdiction of the subject-matter and of the person, irregularities in the proceedings are not reviewable on habeas corpus, and even error in findings of fact are not subject to revision in an appellate court if there was any evidence upon which such findings could be made. Decisions below on the facts must be affirmed where they are not shown to be wrong. (*Hathaway* v. *Cambridge National Bank*, 134 U. S., 494; *Cortes* v. *Jacobus*, 136 U. S., 330; *Mackall* v. *Richards*, 154 U. S., 624; *Jaeger* v. *Moore*, id., 641; *Ponder* v. *Delauney*, id., 651; *United States* v. *Williams*, id., 652; *Groat* v. *O'Hare*, id., 660.)

> * * * the jurisdiction of the commissioner and the sufficiency of the legal ground for his action are the main questions to be decided; and this court declines to consider questions respecting the introduction of evidence or the sufficiency of the authentication of documentary proof. (*Benson* v. *McMahon*, 127 U. S., 457, *syllabus*.)

It is perfectly apparent from the record in this case that there was abundant evidence to sustain the commissioner's findings. He had competent legal evidence before him on which to exercise his judgment as to whether

the facts were sufficient to establish a violation of law by the defendant. (*Cortes* v. *Jacobus, ut supra*, p. 334.)

As was indicated by the opinion of the circuit court of appeals, the constitutionality of section 3 of the act of 1892 is conclusively settled in favor of the Government by the decision in Fong Yue Ting's case. The general doctrines reaffirmed in that case, and the exact points decided, to which reference is made *infra passim*, fully sustain the contention that the law now being discussed is also an exercise by Congress of an inalienable right of sovereignty in a manner consistent with the Constitution.

It is not possible to doubt, in view of the decisions, that Congress has full power and discretion if it sees fit to exclude any class of Chinese persons, and *a fortiori* to impose the conditions on which they may enter and the method of procedure and the rules of evidence by which they may establish their right to enter.

The court invokes (149 U. S., 712) the famous statement of Chief Justice Marshall in the case of *McCulloch* v. *Maryland*, as to the liberty of choice by Congress of the means to carry out its power, namely: "As long ago said by Chief Justice Marshall, and since constantly maintained by this court, 'The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people;'" * * * citing also later cases which illustrate the doctrine.

The opinions in *Wan Shing* v. *United States* (140 U. S., 424), in which also "the evidence offered to show that

the petitioner was a merchant was weak and unsatisfactory" (p. 427), and in *Wong Wing* v. *United States* (163 U. S., 228, 231, 233, 234, 235), affirming again the broad principle of sovereign right enunciated in the previous cases, are strongly suggestive upon the extent of the power of Congress to make provisions merely for the deportation of aliens who are deemed to be unlawfully within the country and to commit the determination of this question to judicial or other officers as the sole and exclusive judges thereof.

The writ of habeas corpus obtained in this case was not that provided by section 5 of the act of 1892, because that provision applies to a Chinese person seeking to land in the United States to whom that privilege has been denied; that is, to a *collector's* refusal to admit. It was doubtless in view of the plain scope of section 3 of the act of 1892 that the circuit court of appeals held in effect that the only questions which can be presented upon this writ of habeas corpus relate to the jurisdiction of the commissioner and the legality of the order of deportation. This is in accordance with the general rule, also, that in proceedings upon habeas corpus the facts found below upon which the writ was founded may not be reexamined or controverted in the appellate court. (*Ex parte Lange*, 18 Wall., 163; *Ex parte Curtis*, 106 U. S., 371; *Ex parte Caroll*, id., 521; *Ex parte Hung Hang*, 108 U. S., 552; *Benson* v. *McMahon*, 127 U. S., 457; *Cortes* v. *Jacobus*, 136 U. S., 330; *Horner* v. *United States*, 143 U. S., 207.)

And this certainly seems to be true as applied to the present case, and in view of the language of the statute, and is consistent with the language of Mr. Justice Miller

in the opinion of the court in *In re Neagle* (135 U. S., 1, 42), to the effect that proceedings for review on habeas corpus being by appeal under the statutes, the entire case on both law and facts is to be reconsidered *except when specially provided otherwise*. Now, the act before the court does clearly in effect specially provide that the evidence must be sufficient to satisfy the commissioner and may not be reexamined or controverted.

Apart from the commissioner's finding of fact upon the conflicting testimony that the defendant was a laborer, it was within his competency to hold, in view of the provisions of section 2 of the act of 1893 requiring a Chinese applicant for entrance into the country who alleges that he was formerly engaged here as a merchant to establish his status by the testimony of two credible witnesses other than Chinese, that the applicant had not established by affirmative proof, to the commissioner's satisfaction, his right to remain. In other words, it was equally within the commissioner's function and authority to hold conclusively as matter of fact that the applicant was a laborer, and therefore could not land at all, not being within the conditions and protection of the treaty of 1894, or was a returning merchant who had not presented the required character and amount of proof.

VI.

The commissioner's finding sustained by the evidence; section 2 of the act of 1893.

But the finding was abundantly justified by the record evidence. The Government does not need to point out

the obvious desire and concerted endeavor of the Chinaman, his associates, and his other witnesses to sustain the merchant classification on improbable claims and assertions, nor to emphasize their strong interest on that side of the question. Nor does the Government need to suggest the imperfect conception entertained by Chinamen of the nature and sanctity of an oath under our jurisprudence (*Chae Chan Ping's* case, 130 U. S., 581, 598), which is illustrated by Li Sing's repeated denial of sufficiently established facts regarding acquaintance and conversations with other witnesses, calling forth in one instance (p. 16) the commissioner's caution as to perjury. The statements, for instance, as to Li Sing's brother, to whom the laundry had been sold and who might have been mistaken for him, and who had to an English ear identically the same name, and whose absence in China at the time of the hearing was not proved but only asserted, are so improbable that they bring to mind the facts and the decision in *Quock Ting* v. *United States* (140 U. S., 417), in which it was held that the uncontradicted evidence of interested witnesses to an improbable fact does not require judgment to be rendered accordingly. Here the particular statements just referred to were not contradicted directly, but the case of the applicant as a whole was repeatedly contradicted and plainly disproved.

The two witnesses, Shafer and Anderson (pp. 35, 37), apparently white, who testified in Li Sing's behalf, stated nothing which was not consistent with his being merely a laborer or an employee in the merchant firm, and continuing, nevertheless, his ordinary avocation as laundryman.

As the commissioner considered the Chinese testimony notwithstanding the Government's objection (although Nos. 3 and 6 of the new assignments of error, page 2, appellant's brief, strangely deny this), the constitutionality of section 2 of the act of 1893, as the circuit court of appeals said, is not raised by this record; and the consideration of that question becomes therefore merely abstract and academic. Nevertheless, it may be suggested that the constitutionality of this law is sustained generally by the entire line of Chinese decisions and the related decisions of the court. The United States as a sovereign nation may exclude or expel aliens, and *a fortiori* may regulate their coming and impose conditions and terms upon which they may be admitted. This proposition is sustained by the decision in the *Chinese Exclusion* case, *supra*, holding that an applicant (in that case a laborer) might be absolutely deprived by a subsequent act of Congress of rights already granted. It is sustained by the case of *Nishimura Ekiu* v. *United States* (142 U. S., 651, 659), which held, adopting the reference to that case in the *Lem Moon Sing Case* (158 U. S., 543), that the United States has the power "to forbid the entrance of foreigners within its dominions or to admit them only upon such terms and conditions as it may see fit to prescribe." It is sustained by the *Lem Moon Sing Case* (id., 547): "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country * * * is settled by our previous adjudications."

It is sustained more particularly by those passages in the decision in *Fong Yue Ting* v. *United States* (149 U S.,

698, 729) which discuss section 6 of the act of 1892 and the provision therein that a Chinese laborer who neglects to register shall establish to the satisfaction of the judge before whom he is taken, by at least one credible white witness, that he was a resident of the United States at the time of the passage of that act, namely: "[This provision] is within the acknowledged power of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government." The court then proceeds to point out that the competency of all witnesses rests on acts of Congress, which Congress may in its discretion modify or repeal, and to point out the reason, resting in the experience of Congress, as mentioned by Mr. Justice Field in Chae Chan Ping's case, for requiring a Chinese alien thus to prove the facts of his residence here—that the admission under former acts of Chinese testimony to prove similar facts "was attended with great embarrassment from the suspicious nature in many instances of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath." (130 U. S., 598.) And the court (in the Fong Yue Ting case, *ut supra*) also points out the requirement in the naturalization laws that applicants for naturalization must prove their residence by the oath or affirmation of citizens of the United States.

The conclusion of the court in that case was as follows:

> The question whether and upon what conditions these aliens shall be permitted to remain within the United States being one to be determined by the

political departments of the Government, the judicial department can not properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

VII.

The continuing necessity for exclusion of Chinese.

It might be suggested by the other side that our Chinese laws are unnecessary and unjust; that in the passage of time the aspect of the question has changed; that the evils consequent upon the admission of Chinese into this country are much lessened, and that considerations of high moment fairly call for a relaxation of the rigors of the law; but the laws are still on the statute books to be enforced, and investigation of the facts shows that the evils still exist and are not decreasing; that the devices to evade the law and the efforts to defy it are just as numerous and persistent as in former years; and that the language of Mr. Justice Field, a portion of which has been quoted in this brief, is still applicable to this subject. (112 U. S., 565–568, 569.) See also the similar suggestions in the *Chinese Exclusion* decision (130 U. S., 606), in connection with which, in the earlier case, the learned justice (112 U. S., 567, 570) called attention to the real lack of mutuality between the two nations in respect to reciprocal privileges, immunities, and exemptions, notwithstanding the stipulations of the treaties. While the exclusion laws have been in operation for a number of years since the first of the Chinese decisions

of the court, the conditions existing among "the unnumbered millions on the opposite shores of the Pacific," and the very different conditions existing in the different and higher civilization here (as we think our civilization is) still exist and continue to require now, as they required then, the enforcement of the restrictions upon this immigration. Further, the statement made by the same learned justice in the dissenting opinion in the *Fong Yue Ting* case (149 U. S., 751), though relating to Chinese laborers, is applicable also to numerous Chinese persons who profess to be merchants or of other occupations and not laborers, namely:

> [They] came into the country by water and by land; they came through the open ports and by rivers reaching the seas, and they came by way of the Canadas and Mexico. New means of ingress were discovered, and in spite of the vigilance of the police and customs officers, great numbers clandestinely found their way into the country. Their resemblance to each other rendered it difficult and often impossible to prevent this evasion of the laws.

Among the results of this resemblance are the claims, notoriously made in numerous instances and often successfully, that the applicant is returning to this country, although he may never have been here before; or is a returning merchant, when he is a returning laborer who is not entitled to reenter; or that he is a citizen of the United States by birth. And it is notoriously part of the means of evasion of the law that evidence appropriate to each case is manufactured, so to speak, either by means of the false testimony of pretended fathers, or by

means of fabricated, manipulated, or altered certificates, different photographs being substituted, and other similar means adopted to defraud, all of them promising a likely chance of success because of the racial resemblance and the difficulty in detecting imposition.

It has been the experience of the Treasury Department and the Department of Justice that the same devices which were in use in earlier days and which are indicated in the opinions of the court are still persistently used to introduce Chinese into this country contrary to law.

The applicants to land or to enter the country now, just as much as in the days of which Justice Field was speaking (112 U. S., 578), whether or not they ever before saw our shores, "yet will produce a multitude of witnesses to establish their former residence, whose testimony can not be refuted and yet can not be rejected," unless the constitutionality of the existing laws is sustained.

VIII.

The recent cases of Ping Yik and Pin Kwan.

There is another point to be made in the case. The arrangement appears to have been that Li Sing paid the "merchant" firm of Sam Palmer & Co. $1,200 for his interest, or contributed that sum to the capital (pp. 38, 40), and that Li Sing received from the firm during the last year in which he lived in the United States (apparently before his departure for China in June, 1893) a little over $200, exclusive of his regular salary, which

was $30 a month (p. 10). This arrangement suggests that he had invested money in the firm's business, but at most was only a clerk or some other of the variety of "merchant's assistants," such as "purchaser and seller," "assistant accountant," or "trader," as the attachés of those firms are variously known.

Now, section 2 of the act of November 3, 1893, also provides a definition of the term merchant which "shall have the following meaning, and none other: A merchant is a person engaged in buying and selling merchandise at a fixed place of business, *which business is conducted in his name*, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant."

The cases of the *United States* v. *Pin Kwan* and the *United States* v. *Ping Yik*, although the applicants there had entered the country for the first time and were not returning, illustrate some of the features of the present case. The cases have not yet been reported, and the decisions are given in an appendix to this brief. The facts, without dispute, were that Pin Kwan had entered the country at Buffalo, N. Y., in October, 1897, upon a certificate under the act of 1884, describing him as an "assistant accountant." He was arrested in March, 1899, as a Chinese person not lawfully entitled to remain in the United States. His certificate was incomplete and defective in that it did not state, in addition to other matters as required by the act of 1884, the nature, character, and estimated value of the business carried on by him prior to the time of his application. The evidence

was that he had an interest in the stock of goods of the firm of Quong Sing Lung & Co., at Buffalo, and had been attending to their business, keeping the books and selling goods, and that he had not done anything else since his arrival in the country.

The certificate of Ping Yik (who entered the country and was arrested at the same time as Pin Kwan) described him as a "purchaser and seller;" was also defective in the respects stated, and the evidence as to him showed that he had an interest of $1,000 in the same company, for the use of which he was to receive $40 per year and $30 per month for his services. He had bought merchandise in China to send to Buffalo. He stood behind the counter and sold goods in Buffalo. But while the Chinese evidence was that he never worked in a laundry, the two Government witnesses testified that they had seen him working in a Chinese laundry at Buffalo, starching and washing clothes.

The United States contended that both of the applicants were laborers; that they were not merchants within the statutory tests, because their names did not appear in the firm designation; that their certificates were fatally defective; and that, not being merchants upon the designations given them in their own certificates, they were not entitled to admission to this country, even if not laborers, because they were not expressly included in the exempt classes, the Government's theory being that the policy dictating the treaties and laws in reference to Chinese is not that all Chinese may enter this country who are not expressly forbidden, but that only those

may come in who are expressly allowed. The Government cited upon the various contentions the following cases among others: *United States* v. *Yong Yew*, 83 Fed. Rep., 832 (in which the applicant appears to have been a laundryman with a substantial interest in a Chinese grocery); *United States* v. *Chung Ki Foon*, id., 143; *United States* v. *Ah Fawn*, 57 Fed. Rep., 591; *Lai Moy* v. *United States*, 66 Fed. Rep., 955; *United States* v. *Chu Chee et al.*, 87 Fed. Rep., 312; 21 Op. A. G., 5 (holding that "a Chinese person does not bring himself within the statutory definition of merchant unless he conducts his business either in his own name or in a firm name of which his own name is a part." See also *Mar Bing Guey* v. *United States*, 97 Fed. Rep., 576); *In re Quan Gin*, 61 Fed. Rep., 395 (which was the case of a returning Chinaman who claimed to be a merchant, and in which it was held that such a person must be excluded when it appears that the business was conducted under a firm name of which his own name was not a part); 21 Op. A. G., 6.

It was contended by the Government that even where unskilled manual labor, or manual labor in a laundry, was not done, the work of a clerk or similar employee in a Chinese mercantile firm or grocery was manual in character, although it might be skilled manual labor; that it is a common practice for Chinese in this country, as well as other people, to invest money in some mercantile pursuit, and at the same time become clerks or other employees of the merchant in whose business they

have invested their small capital; but that such a circumstance does not in any sense constitute the employee a merchant. And it may be observed here that the development of this practice among the Chinese in this country has produced many firms with a phenomenal number of "partners," and such firms in many cases have been shown to be merely confederated agencies for introducing into this country Chinese persons who have no right to enter or whose right to enter is very doubtful.

In the Pin Kwan and Ping Yik cases the United States commissioner ordered the defendants to be deported, and the district court for the northern district of New York (Coxe, J.) reversed the order of the commissioner and remanded the causes, with instructions to discharge the defendants, on the ground that the defendants were merchants, even within the strict definition of the act of 1893; that it was not necessary that their names should appear in the firm designation; that they had done no manual labor since they had been in this country, and that a Chinese person, not a laborer, who has come here with a certificate properly signed and viséd, and after examination has been permitted to enter the United States, and has engaged in business here as a merchant for seventeen months, can not, in the absence of fraud, be deported upon the ground that the certificate is incomplete and defective in matters of nomenclature and description, the court perceiving no difference worthy of remark between the facts in the two cases.

It will be observed (see Appendix) that the circuit court of appeals found that the certificates failed to conform

to the requirements of the statute in respect to the omission to state the nature, character, and estimated value of the business; that the admission of the defendants by the customs officers did not constitute an adjudication, and was not to be construed into an estoppel of the Government in the exercise of its power to exclude or deport aliens. "The defendant, so far as the proof shows, is in fact but a clerk and bookkeeper or assistant accountant in the employ of the company, who sometimes sells its goods and keeps its books. He is not a merchant, but a skilled manual laborer, and as such liable to deportation." And the court notes the fact that in the Ping Yik case the defendant had been engaged in laundry work since his entry, and in both cases reversed the decision of the district court and ordered deportation.

It seems, therefore, as the United States contends, that an "assistant accountant" or "purchaser and seller" is not to be included among the exempt classes as a kind of merchant. The applicant here, at the most, was obviously nothing more than a clerk or other such employee in the firm of merchants, which puts him into the classification of skilled manual laborers, and therefore, not being a registered laborer, is not entitled to be in this country at all, upon the general broad ground that he is not among the exempt classes, even if his allegations as to his connection with the firm are taken as verity.

It has seemed worth while to bring these recent cases to the court's attention by this somewhat lengthy review in order to show how claims not dissimilar to the one made here have been disposed of, after elaborate argument

and careful consideration by a circuit court of appeals. Although the applicant here is not entering for the first time, but claims to be a returning merchant, the argument of the Government is not only that he is not a merchant at all but a laundryman and laborer, but that so far as there is any color to the claim of merchant character the undoubted weight of decisions is against the applicant, and shows that such an interest in a merchant firm as he alleges is merely that of clerk or employee, and constitutes him a skilled manual laborer and nothing else. Even if a clerk should not be regarded as a "skilled manual laborer," which is included in the word "laborer" (section 2, act of 1893), he is not a merchant nor among the other exempt classes, and therefore is not entitled to admission.

(P. S.—Since writing the above it is learned that an application will be made to bring the Ping Yik and Pin Kwan cases before this court for review.)

IX.

An underlying question—Assuming a certain connection of Li Sing with the merchant firm.

The United States stands in this case upon the conclusive finding of the commissioner and the record evidence showing that Li Sing is a laborer. But let it be admitted, for the sake of argument, that he is neither a skilled nor unskilled manual laborer (section 2, act of 1893), and let the allegations on his behalf as to his connection with the merchant firm be taken as true, then we say that he is not a merchant under the definition of the

act of 1893, as construed by the decisions heretofore referred to; that he is merely a clerk or other similar employee of the firm, and, being that, and not being a registered laborer, protected as to return by the treaty of 1894, he is entirely without right to remain in the United States.

Let us examine, then, the fundamental question as suggested by the cases referred to in the last section of the brief, the question, namely, whether any Chinese person may enter and remain in the country unless he is expressly permitted by the laws to do so. The theory of applicants generally is that, while the coming of all Chinese persons may be regulated, as by the certificate requirements, all Chinese persons who are not laborers are entitled to come; while the theory of the Government is that the laws plainly indicate the policy and rule to be, not that all Chinese may enter this country who are not expressly forbidden, but that only those may do so who are expressly allowed (opinion of the Attorney-General dated July 15, 1898, printed in the appendix to this brief).

The treaties with China of 1844 (8 Stat., 592) and of 1858 (12 Stat., 1023) refer only to the rights and privileges of merchants and other citizens of the United States in China, and not to Chinese subjects in this country. The additional articles to the latter treaty, concluded in 1868 and thereafter duly ratified (16 Stat., 739), introduced for the first time the notion of reciprocal rights granted to the citizens or subjects of the two countries. Article IV declares that citizens of the United States in China and Chinese subjects in the United States shall

enjoy entire liberty of conscience. Article V recognizes the inherent right and mutual advantage of free and voluntary migration of the citizens and subjects of the two nations, and reprobates the evil theretofore known of any other than an entirely voluntary emigration. Article VI accords mutually and reciprocally (to American subjects visiting or residing in China and to Chinese subjects visiting or residing in the United States) the privileges, immunities, and exemptions, in respect to travel and residence, of the most favored nation, withholding the right of naturalization. And Article VII, as one of these privileges, confers reciprocally the benefits of the public educational institutions of the two countries, and grants the right to establish and maintain schools on the part of the members of each nation in the country of the other.

The development of these treaty stipulations is carefully reviewed in the opinion of the *Chinese Exclusion Case* (130 U. S., 581, 590, *et seq.*). The stipulations suggest, especially by the phrase in Article V of the treaty of 1868, "for purposes of curiosity, of trade, or as permanent residents," from which the permissive classification of the later treaties, presently to be referred to, seems to have been expanded, that they contemplate Americans in China rather than Chinese in the United States; and the earlier treaties suggest the original bearing and force of the term *merchant*, as applied to the type of western merchant of large dealings and high character in the East Indian and oriental trade, or to the similar type of merchant of the Orient, in contrast with the deterioration of the term among the Chinese

to-day in this country (in order to bring themselves within the law), by which every Chinese corner grocery is a firm of "merchants," although the establishment is often merely an adjunct to a laundry, and although even when not so it is often a means and cover for introducing Chinese illegally into this country.

The stipulations of these treaties also recall the remarks of Mr. Justice Field already referred to respecting their lack of mutuality, because the burden of the earlier treaties was to restrict and hedge about entrance into China for commercial purposes in accordance with the immemorial policy of the Empire, and although any grant of privileges was a concession from the former prohibition of all intercourse, and the privileges of foreigners (irrespective of treaties) have been enlarged and the restrictions curtailed steadily until the present day, the import of all the rights granted to us was to guard jealously the Empire from the intrusion of foreigners beyond defined limits, and to prevent free commercial access to the Chinese territory. In other words, the process with the two nations has been exactly opposite, in both cases, no doubt, in obedience to underlying natural laws of inevitable progress and necessary protection, respectively; that is to say China, starting from a condition of absolute separation from and antagonism to foreigners has gradually and cautiously removed a part of the complete prohibition to intercourse. The United States, on the other hand, starting from the point of substantially complete absence of immigration restrictions, on the ground that it was the right attitude and policy for this nation, because

of its fundamental principles, to invite freely all peoples who were oppressed or retarded in their progress to settle in this country, has found it necessary in the passage of time to withdraw that open welcome and to apply, for certain well-known reasons in the Chinese case and for similar reasons in reference to other undesirable or dangerous immigration, numerous restrictions and bars.

The treaty of 1880 (22 Stat., 826) in the preamble (Art. I) declared that the "Government of China agrees that the Government of the United States may regulate, limit, or suspend, * * * but may not absolutely prohibit" the coming to the United States or residence therein of Chinese laborers. "The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations." Article II provided that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." This treaty presents a contrast with the earlier treaties for the reverse reason, namely, because it applies only to Chinese in the United States and not at all to Americans in China.

Although the first article declared that other classes of Chinese than laborers were not included in the limitations, the second article declared expressly and specific-

ally that the Chinese subjects who might go and come of their own free will and accord, besides the laborers who were then in the United States, were those proceeding to the United States as teachers, students, merchants, or from curiosity. This in itself must be held to define and limit the exception or exemption in the first article. It shows clearly and definitely the intention of the high contracting parties, and points out, by a phrase without doubt carefully studied and agreed upon, those whom the Chinese Government desired to protect and to embrace in the exemption of the first article. And if this argument in itself is not considered sufficient, the question is then presented whether, since the clear and express right of Chinese laborers under Articles I and II was disregarded and absolutely denied by the act of October 1, 1888, on the ground of sovereign power and national safety, the later laws now to be discussed have not manifestly had precisely the same effect upon the supposed broad exemption in favor of classes of Chinese persons other than laborers.

For instance, section 6 of the act of 1882, which was an act to *execute* treaty stipulations relating to Chinese, in its original form as well as amended by the act of 1884, refers to "every Chinese person other than a laborer who may be entitled by said treaty [that of 1880] or this act to come within the United States." Why was this relative clause describing and limiting every Chinese person other than a laborer necessary to be inserted if all such Chinese persons without exception were entitled to enter the country? The inoperative act of September 13, 1888, indicates that in the mind of the legislature under the

language of the treaty of 1880, and the acts of 1882 and 1884, the view of the Government is correct, because the provision of section 1 is that "it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States except as hereinafter provided," and then in section 2 it is declared that Chinese officials, teachers, students, merchants, or travelers for pleasure or curiosity shall be permitted to enter the United States. Section 3 of that act (and see also section 15 of the act of 1882 as amended) declares "that the provisions of this act shall apply to *all persons* of the Chinese race, whether subjects of China or other foreign power, excepting Chinese diplomatic or consular officers and their attendants." * * *

Thus the inoperative act of 1888 gives the final form of the permissive phrase and that is the form adopted in Article III of the treaty of 1894, which provides "that the provisions of this convention shall not affect the right at present enjoyed of Chinese subjects being *officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers,* of coming to the United States and residing therein." This article of the treaty (which is, of course, a law) undoubtedly states the rule of the case, and by the plain force and meaning of the terms used as agreed upon and adopted by both Governments, a Chinese subject, to be entitled to admission into this country, must not only not be a laborer, but must be an official, teacher, student, merchant or a traveler for curiosity or pleasure. These terms all seem clear and definite, except possibly the term "officials,"

which appears necessarily to refer to officials of the Chinese Government, but so far as can be discovered has received no authoritative definition, either in the proceedings to negotiate the treaty or in subsequent laws and decisions.

We can not perceive any reason to doubt that the well-known maxim *expressio unius est exclusio alterius* applies to this matter. If all Chinese persons other than laborers are to be admitted, why affirmatively express the classes who enjoy the right? If an actor, or an artist, or a dentist, or a doctor may be admitted, why were not such classes, either under those names or under some more general description, included, as well as students or merchants? A trader, or an assistant to a merchant, or a clerk, or an accountant is not a merchant. Are such Chinese persons therefore entitled to admission? We think it is evident that such a broad and universal right, opening the doors to all Chinese persons except those who are either skilled or unskilled laborers, was never intended, in view of the dangers suggesting the exclusion laws and the purposes for which they were enacted. In other words, laborers are particularly and by mandatory provisions excluded, but so, by the effect of the treaties and legislation, are all others not affirmatively allowed to enter.

Section 6 of the act of May 5, 1892, authorizes a certificate of residence to be issued to a Chinese person other than a laborer having a right to be and remain in the United States. This is a very significant provision and clearly indicates the possibility of the presence in the United States of Chinese persons not having a right to

be and remain therein, although they are not laborers. This provision remains in that section as amended by the act of 1893; and the act of May 5, 1892, continues in force for a period of ten years all laws prohibiting and regulating the coming into this country of Chinese *persons* and *persons* of Chinese descent; it does not only prohibit the coming of Chinese *laborers*.

The classes named in Article III of the treaty of 1894 are entitled to admission upon producing a proper certificate. The undefined classes lying between (so to speak) the class of laborers and the expressly permitted classes are not by inference included in the latter, but are by necessary implication included in the former. At least they are without right to enter, although not expressly forbidden, because they are not expressly allowed. Any other view of the case fails to consider the Chinese treaties and exclusion laws and the progressive intention and scope thereof. A well-defined doctrine justifies the contention that the policy of the Government, being against the admission of Chinese, treaty provisions making exceptions should not be expanded by implication to classes not falling within the plain scope of the language used. "The title and terms of exclusion of the act approved May 5, 1892, indicate that *the scope and purpose of the act are to permit only such persons to enter and remain in the United States who are expressly designated as being entitled to the privilege.*" (*United States* v. *Chu Chee et al.*, 93 Fed. Rep., 797.)

In *United States* v. *Ah Fawn* (57 Fed. Rep., 591), arising and decided before the ratification of the treaty of

1894, negotiations between the United States and China leading up to the treaty of 1880 are carefully investigated, and it is shown that the United States commissioners in a communication to Mr. Evarts, then Secretary of State, stated that the negotiations intentionally did not define with precision exactly what the negotiators on both sides understood by Chinese laborers, and they claimed that the Chinese Government agreed that in Article II of the treaty of 1880 "they did by exclusion provide that nobody should be entitled to claim the benefit of the general provisions of the Burlingame treaty (1868), but those who went to the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity." "The history of the negotiations clearly shows that throughout them the United States commissioners insisted that the words 'Chinese laborers' should include all immigration other than that for teaching, trade, travel, study, and curiosity." (See also Senate Doc. No. 148, Forty-seventh Congress, first session; Vol. V of that session, 1881–82.)

> In my opinion the words "Chinese laborers," as used in section 1 of the act of November 3, 1893, refer not only to those actually engaged in manual labor at the date of the passage of that act, but were intended to include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, *and those who are not officers, teachers, students, or travelers for curiosity within the* meaning of the treaty of September 17, 1880. (Judge DeHaven in *United States* v. *Chung Ki Foon*, 83 Fed. Rep., 143.)

The concluding paragraph of the opinion in the *Wan Shing Case* (140 U. S., 424), stating the result of the

legislation to be that no Chinese laborer shall be permitted to enter the United States or to return after having departed, and "that all other persons of that race except those connected with the diplomatic service" must produce the proper certificate showing their right to enter, is by no means inconsistent with the Government contention that only such other persons of that race *as are expressly entitled to enter* are included in the permission. In other words, the significant phrase may properly be viewed as meaning *all other persons of that race who are entitled to enter*, etc.

The executive decisions are in accordance with this view. In addition to the opinion of the Attorney-General of July 15, 1898, appended to this brief, the following executive decisions and opinions take the same ground: Syn., Dec. 14, 877, 18, 575, 19, 677, 20, 474, 20, 893; 21 Op. A. G., 5; Op. A. G. of November 3, 1898; Op. S. T., July 16, 1895; id., April 17, 1896; id., November 2, 1897; id., November 4, 1897; id., March 1, 1899; id., April 3, 1899.

Applying these principles to the present case, we maintain that if this man is a laborer he must of course be deported, because he has not been registered and is not within the permission to return granted by the treaty of 1894; and even if it should be conceded that he is not a laborer at all, he is nevertheless not entitled to remain here, because he is plainly not a merchant as defined by the law. His alleged connection with the merchant firm in which he claims a moderate interest by investment, stating that he received monthly wages, or salary, shows

that he was merely some sort of clerk, or salesman; as such he does not fall within any of the classes permitted by the laws, including the treaty of 1894, to enter this country, and therefore is without right to remain here and must be deported.

On the whole case and the record it is therefore respectfully submitted that the judgment of the circuit court of appeals herein should be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF UNITED STATES v. PIN KWAN.

LACOMBE, Circuit Judge:

On March 17, 1899, complaint was duly made under oath charging that Pin Kwan on October 27, 1897, "did unlawfully come into the United States from the Empire of China, the said Pin Kwan being then and there a Chinese person and laborer, and not being a merchant or diplomat, or other officer of the Chinese or any other government, and without producing the certificate required of Chinese persons seeking to enter the United States, and that he is not entitled to be or remain within the United States." There is no contention that there was any error in the procedure followed by the United States commissioner, which appears to be that prescribed in section 12 of the act of 1882 as amended by the act of July 5, 1884 (23 Stat., p. 115) and in section 13 of the act of September 13, 1888 (25 Stat., p. 476).

A brief history of the treaties with China dealing with the question of immigration into the United States and of the legislation subsequent thereto will be found in *United States* v. *Ah Fuen* (57 F. R., 591). It will not be necessary to examine into the details of the several exclusion acts. Five years before defendant's entry into this country Congress had passed the act of May 5, 1892 (27 Stat., p. 25), the first section of which provides that

"all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act." Among the laws then in force were these: The act of May 6, 1882 (22 Stat., p. 58), as amended by act of July 5, 1884 (23 Stat., p. 115), section 1, which provided that "from and after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States * * * is hereby suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States."

The treaty with China of November 17, 1880 (22 Stat., p. 826), provided in Article II: "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord," etc. The sixth section of the act of 1882, as amended by the act of 1884, *supra* provided: "That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age,

height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying shall be a merchant said certificate shall, in addition to the above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish. * * * [After providing for a visé of said certificate by a diplomatic or consular representative of the United States at the port or place of departure the section concludes as follows:] "Such certificate viséed as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

Section 15 of the said act of 1882 as amended by the act of 1884 provided "That the provisions of this act shall apply to all subjects of China, and Chinese whether subjects of China or any foreign power; and the words Chinese laborers wherever used in this act shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining."

All these provisions of statute were reenacted and

continued in force by the exclusion act of May 5, 1892, *supra*. Subsequently and prior to defendant's entry the convention of December 8, 1894 (28 Stat., p. 1210), was entered into by the United States and China, the third article of which provides:

"The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided, viséed by the diplomatic or consular representative of the United States in the country or port whence they depart."

Finally, the act of November 3, 1893 (28 Stat., p. 7), was passed, containing the following:

"SEC. 2. The word 'laborer' or 'laborers,' wherever used in this act or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

The certificate which defendant procured before he left China reads as follows, the material parts only being given:

"This certificate is issued * * * to Ng Pin

Kwan, a Chinese person 'other than a laborer,' who is about to go to the United States. * * * Name of permitted person in his or her proper signature. Full name, individual, Pin Kwan; family, Ng, tribal ———. Title official rank if any ———. Age, 25. Height, feet, 5; inches, 3¾. Physical marks or peculiarities, scar on forehead. Former occupation or profession, assistant accountant. Present occupation or profession, assistant accountant. Where pursued, 82 Wing lok street, Hongkong. When, 1892 to 1897. For how long, five years. Place of residence, Hongkong. Who is going to Buffalo, N. Y., to join Quong Sing Lung & Co., 500 Michigan street, and attend the business of the said company."

It is manifest that this certificate fails to conform to the requirements of the statute, for, although defendant claims that he applied as a merchant the certificate wholly fails to "state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application" Evidently a printed form which had been prepared for a person other than a merchant was used. Defective though it was, however, it was signed by the representative of the Chinese Government, was viséd by the United States consul at Hongkong, and accepted by the Government officers as sufficient proof of right to enter the United States when presented by defendant upon his arrival at Buffalo. These facts do not constitute an adjudication, nor can they be construed into an estoppel of the sovereign exercising its political power to exclude or deport aliens. Nevertheless, if defendant were in fact entitled to come here, the courts might be astute to find some way to avoid merely formal defects in his certificate. But the fundamental difficulty is that defendant was not entitled to entry when he came here, nor is he entitled to remain, even if his certificate were correct in form, the

statute *supra* providing that the certificate may be controverted and the facts therein stated disproved by the United States authorities.

Upon the hearing before the United States commissioner the testimony of a Chinese person was offered on the part of defendant and received under the objection of the district attorney. This was error. The statute, *supra*, expressly provides that the certificate "shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States." But the testimony thus improperly received was insufficient. Young Chuck testified that he, the witness, has carried on a general merchandise business in Buffalo for seven years—evidently in connection with the Quong Sing Lung Company, since he signed the lease for said company. The company carries a stock of tea, wines, tobacco, clothing, etc., worth about $8,000, and insured in the name of the company for $5,000. He further testified that since his arrival Pin Kwan has lived at the stores of the company, "attends to the business, keeps the books, and sells goods," and that "he has an interest in the stock of goods and has had ever since he came here;" but what that interest is does not appear. This does not bring him within the definition of a merchant prescribed by the statute, there is nothing to show that he is engaged in both buying and selling, and certainly the business is not conducted in his name. The circuit court of appeals in the ninth circuit has held that the statute is to be so construed as to eliminate the clause expressly inserted by Congress, "which business is conducted in his own name," whenever the interest of the merchant is "real and appears in the business and partnership articles in his own name." Without now expressing an opinion as to the soundness of so much of that decision as applies the doctrine laid down in *Church of Holy Trinity* v. *United States* (143 U. S., 457), to ex-

punge from a statute words seemingly inserted with careful intention, it is sufficient to say that there is not a scintilla of evidence in the case at bar to show that Pin Kwan has an interest in the Quong Sing Lung Company, which is real, and appears in the business and partnership articles in his own name. The defendant, so far as the proof shows, is in fact but a clerk and bookkeeper, or assistant accountant in the employ of the company, who sometimes sells its goods and keeps its books. He is not a merchant, but a skilled manual laborer, and as such liable to deportation.

The decision of the district court is reversed and deportation ordered.

OPINION OF THE CIRCUIT COURT OF APPEALS IN THE CASE OF UNITED STATES v. PING YIK.

PER CURIAM: The facts in this case are substantially the same as in the case of Pin Kwan, decided to-day. There is, however, some testimony by the deputy United States collector and by the deputy marshal that the defendant has been engaged in laundry work since his entry.

Decision reversed and deportation ordered.

OPINION OF THE ATTORNEY-GENERAL, JULY 15, 1898.

DEPARTMENT OF JUSTICE,
Washington, D. C., July 15, 1898.

The SECRETARY OF THE TREASURY.

SIR: I have the honor to acknowledge the receipt of your communications of June 8, June 27, and June 28, with their various inclosures, relative to the admission into this country of certain Chinese persons known as "traders," under a certain form of certificate framed by the United States consul at Canton, China. The papers

submitted present, in effect, the question whether the persons referred to are entitled to admission to this country upon presenting a certificate actually or substantially in accordance with the requirements of the act of July 5, 1884, having in view the provisions of the treaty of December 7, 1894, upon the subject, relative to which question you request my opinion. It is understood that the Chinese persons involved seek admission to the United States for the first time.

The language of section 6 of the act of July 5, 1884, is mandatory, and provides that Chinese of the classes exempt under the treaty of 1880 or the act of 1884 "shall obtain" the permission of their Government to come to the United States, and shall be identified as so entitled, to be evidenced by a certificate, which shall conform to certain requirements and be visèed by the diplomatic or consular representatives of the United States in the country from which the certificate issues, or at the port whence the person in question is about to depart. One requirement is, if the applicant for admission is a merchant, that the certificate shall state the nature, character, and estimated value of his business. The case of *Wan Shing* v. *United States* (140 U. S., 424), confirming generally the necessity for the production of a certificate under the act of 1884, uses the language: "[The Chinese petitioner's] right to land, therefore, rested upon his establishing the fact that he was not a laborer." But this is to be understood as limited by the subsequent language of the court, viz: "Every Chinese person, other than a laborer, who may be entitled by [the treaty of 1880 and the act of 1882 as amended by the act of 1884] to come within the United States * * * shall be identified," etc. In other words, merely not to be a laborer is not conclusive of an applicant's right to admission.

It has been held by your Department that the omission of any of the statutory requirements from a certifi-

cate is a fatal defect, and that the provisions of the treaty of 1894 (presently to be referred to) do not waive any of the requirements of section 6 of the act of 1884 as to certificates of merchants and others of the exempt classes (*United States* v. *Yong Yue*, 83 Fed. Rep., 832) in accordance with 21 Op., 6; id., 68. I concur in the opinions of my predecessor on these points. While it may be argued with force that the treaty of 1894, being the later law, may modify the requirements of previous legislation in some respects (21 Op., 347), I do not believe it can be successfully contended that because the language of the treaty of 1894 respecting the certificate of the exempt classes (Art. III, " * * * Chinese subjects, being officials, etc., * * * *may* produce a certificate," etc.) is not mandatory, but merely permissive, therefore the requirements of the act of 1884 are so far modified that substantial compliance therewith is sufficient. On the contrary, assuming for a moment that a "trader" is entitled to admission as in practical meaning "a merchant," I am of the opinion that a certificate which fails to state the "nature, character, and estimated value of the business" is fatally defective. Furthermore, the statutory definition of merchant (section 2, act of November 3, 1893, 28 Stat., 7) requires the merchant's business to be conducted in his name, which would exclude from classification as a merchant a clerk or "merchant's assistant," which is what "trader" appears to be. (21 Op., 5.) But the opposite hypothesis, that a "trader" is not a "merchant," and the elements of the latter's certificate are not requisite, leads us to considerations affecting the right of a "trader" to admission at all, which relegate to the background the question as to the proper form of certificate.

Laying aside as obviously not conclusive the general permissive language of our Chinese legislation, particularly of the earlier treaties and acts, e. g., Article V of

the treaty of 1858, recognizing the mutual advantage of free migration "for purposes of curiosity, of trade, or as permanent residents," it may be stated comprehensively that the result of the whole body of these laws and decisions thereon is to determine that the true theory is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed. This view is recognized by the general name under which the laws are known, viz: The Chinese exclusion acts. Rights have been conferred which may be enlarged, diminished, or taken away altogether at the will of Congress when the existing treaty obligations expire, as a larger measure of rights existing in the past has already been withdrawn. (*Chae Chan Ping* v. *United States*, 130 U. S., 581; *Nishimura Ekiu* v. *United States*, 142 U. S., 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S., 698; *Lem Moon Sing* v. *United States*, 158 U. S., 538; *Wong Wing* v. *United States*, 163 U. S., 228.)

The exempt classification is marked out by the phrase "officials, teachers, students, merchants, or travelers for curiosity or pleasure." While the suspension of Chinese immigration, foreseen in Article I of the treaty of 1880, was made to apply only to "Chinese who may go to the United States as laborers," the recognition of positive right in Article II describes the favored classes as "teachers, students, merchants, or [those proceeding to the United States] from curiosity." As the legislation by successive acts developed the view of the subject indicated above, which may be conceded to be a departure from or even a reversal of the early theory, those exempt were limited more strictly and defined more sharply. The acts of 1882 and 1884 exempted specifically only diplomatic and other officers of the Chinese Government and their body and household servants, and referred in section 6 of each act to Chinese persons other than laborers "who may be entitled by said treaty [1880] and this act to come

within the United States." The act of September 13, 1888 (25 Stat., 476), which has been generally held not to have gone into effect (although there are conflicting decisions respecting the existing validity of certain portions of it), used the phrase "Chinese officials, teachers, students, merchants, or travelers for curiosity or pleasure," to describe the exempt classes. The act of May 5, 1892 (27 Stat., 25), by section 6 authorizes a certificate of residence to be issued to a "Chinese person other than a laborer having a right to be and remain in the United States." (See also sec. 1 of the act of November 3, 1893, 28 Stat., 7.) Finally the treaty of 1894 adopted the exact phraseology used in the abortive act of 1888.

From this review it appears that a "trader" is not expressly known to the law as among the exempt classes, nor is such a person fairly included in them unless as a "merchant." But in consequence of views hereinbefore expressed, especially with reference to the statutory definition of a "merchant," it is obvious that those described by the United States consular officer who maintains this classification as proper and legally exempt, and devised the appropriate certificate as men "who assist merchants in managing their business, such as salesmen, buyers, clerks, etc.," are not entitled to admission to this country. Although they may be, as stated by the consul in question, "a useful class who render valuable service as traders to merchants in the conduct of their business," it will, in my opinion, require additional enabling legislation by Congress to admit them.

I therefore answer the question proposed in the negative, and return herewith the original papers inclosed, as you request.

Very respectfully,

JOHN W. GRIGGS,
Attorney-General.

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